Public Law Newsletter

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Accidental Failure of Suit, sec. 52-592

Thus, we note that the accidental failure of suit statute, now codified as § 52-592, originally was enacted in 1862; Public Acts 1862, c. 14; see *Baker v. Baningoso,* 134 Conn. 382, 386, 58 A.2d 5 (1948); "to avoid the hardships arising from an unbending enforcement of limitation statutes." (Internal quotation marks omitted.) *Hughes v. Bemer,* 206 Conn. 491, 495, 538 A.2d 703 (1988). Although there is no relevant printed legislative history about § 52-592 due to its age; see, e.g., *Peabody N.E., Inc. v. Dept. of Transportation,* 250 Conn. 105, 121-22, 735 A.2d 782 (1999); it is well established in our long line of case law interpreting the statute in other contexts that § 52-592(a) "is remedial and is to be liberally interpreted." (Internal quotation marks omitted.) *Isaac v. Mount Sinai Hospital,* supra, 210 Conn. at 728, 557 A.2d 116.

In previous cases considering the application of the accidental failure of suit statute, we have declined to adopt an extremely broad construction of the statute to the effect that, "[t]he phrase, `any matter of form,' was used in [contradistinction] to matter of substance, as embracing the real merits of the controversy between the parties." *Johnston v. Sikes,* 56 Conn. 589, 592 (Superior Court 1888) (*Loomis, J.*); see *Lacasse v. Burns,* supra, 214 Conn. at 472-73, 572 A.2d 357. Rather, we have emphasized that § 52-592(a) "does not authorize the reinitiation of all actions not tried on ... [their] merits," and that, "[i]n cases where we have either stated or intimated that the any matter of form portion of § 52-592 would not be applicable to a subsequent action brought by a plaintiff, we have concluded that the failure of the case to be tried on its merits had not resulted from accident or even simple negligence."[16] (Internal quotation marks

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*895 omitted.) *Lacasse v. Burns,* supra, at 473, 572 A.2d 357.

In concluding that even "disciplinary dismissals are not excluded categorically from the relief afforded by § 52-592(a)," we have noted the fact-sensitive nature of the inquiry and held that, "[t]o enable a plaintiff to meet the burden of establishing the right to avail himself or herself of the statute,

a plaintiff must be afforded an opportunity to make a factual showing that the prior dismissal was a `matter of form' in the sense that the plaintiff's noncompliance with a court order occurred in circumstances such as *mistake, inadvertence or excusable neglect.*"[17] (Emphasis added.) *Ruddock v. Burrowes,* supra, 243 Conn. at 576-77, 706 A.2d 967. Indeed, even in the disciplinary context, only "egregious" conduct will "bar recourse to § 52-592." Id., at 576, 706 A.2d 967; see also id., at 576 n. 11, 706 A.2d 967 ("[t]he fact that courts have allowed plaintiffs access to § 52-592[a] in some cases involving [Practice Book § 251, now § 14-3] dismissals does not mean that we must allow recourse to the statute if the attorney's misconduct is egregious"). Thus, in *Ruddock,* we ordered the trial court on remand to make findings of fact with respect to "the circumstances of the plaintiffs' claimed justification for nonappearance at the pretrial conference." Id., at 578, 706 A.2d 967; see also, e.g., *Vestuti v. Miller,* 124 Conn.App. 138, 146-47, 3 A.3d 1046 (2010) (trial court improperly granted defendant's motion for summary judgment because "[w]ithout ... appropriately weighing the evidence and determining credibility, there is an insufficient evidentiary basis for this case [arising from the failure of the plaintiff's attorney to attend a pretrial conference] to be accurately placed on the § 52-592 continuum").

Despite the plaintiffs' arguments to the contrary, Connecticut case law limiting the application of § 52-592(a) to cases of good faith mistake, inadvertence or excusable neglect, and precluding it in cases of egregious conduct by an attorney or party, has been applied beyond the context of disciplinary dismissals. See *Rosario v. Hasak,* 50 Conn.App. 632, 638-39, 718 A.2d 505 (1998) (failure to return complaint in original action for more than two years after service was "egregious and blatant conduct" precluding plaintiff from commencing new action pursuant to § 52-592[a] following dismissal of original action); *Santorso v. Bristol Hospital,* Superior Court, judicial district of New Britain, Docket No. CV 08-5009160, 2010 WL 1545785 (March 17, 2010) ("whether the termination of the earlier action was disciplinary

*896 or nondisciplinary in nature, one of the factors a court must consider in applying [§ 52-190a (a)] is the conduct of counsel in the original action"). Thus, we find instructive decisions of our sister states concluding that their savings statutes may be invoked when the original complaints in medical malpractice cases, otherwise filed in good faith, have been dismissed based on technical failures with respect to required notice and merit certificates. See *Pringle v. Kramer,* 40 So.3d 516, 519 (Miss.2010) (state savings statute applicable to dismissals based on matter of form applies to dismissal for failure to give mandated prelitigation notice in medical malpractice case when that

failure was not result of "bad faith," defined as, inter alia, "gross negligence" and "indifference" [internal quotation marks omitted]); *Davis v. Mound View Health Care, Inc.*, 220 W.Va. 28, 32, 640 S.E.2d 91 (2006) (medical malpractice case dismissed because of insufficient prelitigation notice or certificate of merit may be refiled pursuant to savings statute when party has "demonstrated a good faith and reasonable effort to further the statutory purposes of preventing the making and filing of frivolous medical malpractice claims and lawsuits" [internal quotation marks omitted]); cf. *Brisson v. Santoriello,* 351 N.C. 589, 597, 528 S.E.2d 568 (2000) (plaintiff may refile voluntarily dismissed medical malpractice action pursuant to savings rule when initial action, although procedurally defective for failure to append affidavit of merit, was not brought in "bad faith," such as with no intent to pursue action).

Source: Plante v. Charlotte Hungerford Hosp. (2011)
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